No. 75-1755

Supreme Court, U. S.
FILED
JUN 2 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

J. L. SIMMONS COMPANY, INC.,
Petitioner,

v.

LOCAL 742, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, JOHN FOREMAN, BUSINESS AGENT, AND HAROLD STOLLEY, STEWARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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LOCAL 742, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, JOHN FOREMAN, BUSINESS AGENT, AND HAROLD STOLLEY, STEWARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

J. L. Simmons Company, Inc. ("Simmons") hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, denying enforcement of an order of the National Labor Relations Board.

ORDERS AND OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. pp. 2a-24a) [1] is not yet officially reported. The supplemental

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[1] "Pet. App." refers to the Appendix attached to the instant petition.

decision and order of the National Labor Relations Board (Pet. App. pp. 25a-33a) is reported at 201 NLRB 70. The original decision and order of the Board (Pet. App. pp. 52a-91a) is reported at 178 NLRB 351. The opinion of the Court of Appeals remanding the original decision to the Board for reconsideration (Pet. App. pp. 35a-51a) is reported at 444 F.2d 895.[2]

JURISDICTION

The judgment of the Court of Appeals (Pet. App. p. 1a) was entered on March 4, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether coercive jobsite pressure exerted against an employer who has no contractual obligation to the pressuring union to forego use of prefabricated products required by the project owner violates § 8(b)(4)(B) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., §§ 151, *et seq.*) are as follows:

> § 8(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * * *
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to

[2] On December 7, 1971, the Court denied Simmons' petition for review of that decision. 404 U.S. 986.

engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * * *

STATEMENT

I. The Board's Finding of Facts

On June 2, 1966, the Decatur and Macon County Hospital Association (the "Hospital") requested bids for the construction of an addition to the Decatur and Macon County Hospital in Decatur, Illinois (Pet. App. pp. 53a, 65a). Simmons was the successful bidder and on July 8, 1966, signed a contract with the Hospital for the purchase of material and for the construction on this project (Pet. App. pp. 26a, 53a, 65a). Simmons agreed to abide by the job specifications prepared by Dane D. Morgan and Associates, Architects, and ac-

cepted by the Hospital prior to June 2, 1966 (Pet. App. pp. 62a, 53a, 65a). One specification gave the Hospital the option of requiring Simmons to install either premachined "plastic faced" doors or wood doors (Pet. App. pp. 26a, 53a, 63a).[3]

On August 15, 1966, the Hospital exercised this option, and ordered Simmons to request the prefabricated, factory machined lifetime guaranteed doors from Anderson Wood Products Co.[4] Anderson's life-

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[3] In pertinent part, the architect's specifications (Section 35) provided (Pet. App. 63a-64a):

PLASTIC FACED and WOOD DOORS

1. SCOPE

a. Unless otherwise scheduled, all doors shall be Solid Wood Core Doors with Laminated Plastic Finish as herein specified and shall be identified herein as Plastic Faced Doors.

b. See Method of Bidding. Alternates shall be taken to furnish, install, and finish Solid Wood Core Doors with Flush Wood Veneer Facings, job finished, as herein specified in lieu of Plastic Faced Doors. Flush wood veneered doors are identified herein as Wood Doors.

c. Each door to be factory fit and beveled to net opening sizes and shall be factory machined to satisfy the entire hardware schedule, except for surface applied hardware which does not require shop preparation. No cutting, routing, trimming, or mortising shall be permitted after doors leave factory and doors requiring modifications shall be returned to the factory.

* * * *

2. DOORS

b. Each door to be guaranteed for the life of the building.

[4] Anderson's production employees are represented by a local of the Carpenters' Union, and all Anderson's doors, whether wood or premachined, carry a Carpenters' Union label (Pet. App. pp. 63a-64a).

time guarantee requires that any cutting, routing, mortising, bevelling, or trimming work be done in its plant under its supervision rather than at the jobsite (Pet. App. pp. 26a, 53a, 66a-67a).

Construction began thereafter and Simmons employed members of Carpenters Local 742 (the "Union") on the jobsite. Simmons had no contractual relationship with the Union (Pet. App. pp. 26a, 31a, 53a, 67a). Simmons is signatory to an agreement with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (the "International Union") which requires Simmons to observe provisions of local agreements effective in geographical areas where Simmons engages in business. The Union and the Decatur Contractors Association, Inc. are parties to an agreement, but neither this agreement, nor Simmons' agreement with the International Union contains a work preservation clause prohibiting the installation of prefabricated building products on construction projects (Pet. App. pp. 31a, 67a).

In mid-November 1967, approximately 80 of the premachined plastic-faced and edged doors arrived at the Decatur jobsite (Pet. App. pp. 27a, 54a, 68a). Union steward Harold Stolley noticed these premachined doors and advised Union business agent John Foreman, who then arranged a meeting with Simmons' Vice President Robert Neal on December 1, 1967 (Pet. App. pp. 68a, 27a, 54a). At the conference Foreman stated there was a "problem" about these doors and that their use violated the Union's local agreement with the Decatur Contractors Association (Pet. App. pp. 27a, 69a). However, Foreman was unable to point out any particular contractual provision in support of his assertion (Pet. App. p. 69a). Neal explained that

Simmons "was bound by the specifications of the project" which required installation of premachined doors, and that Simmons "had no control" over which doors would be installed (Pet. App. pp. 28a, 69a). Foreman also expressed concern because Anderson's mill carpenters received lower wages than jobsite carpenters (Pet. App. pp. 27a-28a, 70a).[5] The meeting ended after Foreman threatened Neal that the Union "would not handle" the premachined doors (Pet. App. pp. 28a, 70a).

On December 11, 1967, Union steward Stolley refused to permit members of the Union to handle and install the premachined, plastic-faced and edged doors at the jobsite (Pet. App. pp. 28a, 54a, 70a-71a). Union members engaged in this jobsite work stoppage until February 1, 1968, when, in response to a letter from Neal dated January 31, 1968, Foreman informed Simsons by letter that the Union would permit its members to install the premachined doors under protest (Pet. App. pp. 55a, 74a-75a). After Stolley refused to allow jobsite Union members to handle the doors, the Union, through its attorney, also demanded that Simmons agree to a wage premium in addition to the contractual wage rates for each premachined door installed at the jobsite as a condition for ceasing the strike (Pet. App. pp. 28a, 54a-55a, 71a). Thereafter, Simmons filed the unfair labor practice charge upon which this case is based (Pet. App. pp. 28a, 72a).

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[5] In the words of a newspaper reporter, Foreman subsequently characterized the controversy as one involving doors "which had been manufactured in a shop which paid substandard wages, or wages that were lower than a carpenter should receive" (Pet. App. p. 28a n.8).

II. Decisions and Orders Below

A. The Board's Original Decision and Order

The Board, contrary to the Administrative Law Judge, held that the Union had violated § 8(b)(4)(i) and (ii)(B) of the Act. Applying the control standard, the Board reasoned that because the Hospital required, by means of the architect's specification, the jobsite installation of premachined plastic-faced and edged doors, "Simmons Company was a neutral with respect to the assignment of this work" (Pet. App. pp. 55a-56a). Accordingly, the Board concluded that the Union's December threat of a work stoppage, its December 11-February 1 work stoppage, and its demand for premium pay "was for the [unlawful] purpose of forcing (Simmons) to cease doing business with the Hospital and forcing the Hospital to cease doing business with (Anderson) for the furnishing of premachined plastic faced doors . . ." (Pet. App. p. 56a).[6] The Board ordered the Union to cease and desist from unlawfully coercing Simmons "or any other person with respect to premachined doors", and to post appropriate notices (Pet. App. pp. 57a-59a).

B. The Remand Decision of the Court of Appeals

The Court of Appeals concluded that the control standard is "in fundamental conflict" with the surrounding circumstances test set forth in *National Woodwork*[7] because it "elevates control" over other

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[6] The Board declined to rule whether a demand for "premium pay" unaccompanied by a strike or a strike threat "would in and of itself be violative of § 8(b)(4)(i)(ii)(B)" (Pet. App. 56a n.7).

[7] *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612 (1967) (hereafter "National Woodwork").

factors, "focuses on the wrong set of circumstances", and "fails to evaluate the substance of the Union's objective by looking to see whose labor relations it is addressed to" (Pet. App. pp. 45a-46a). The Court acknowledged that Simmons was not party to any specific work preservation clause (Pet. App. p. 48a), but concluded that such an equity "is not dispositive of this case" (Pet. App. p. 50a). The Court of Appeals remanded the case to the Board for further consideration (Pet. App. pp. 50a-51a).

C. The Board's Supplemental Decision and Order

"Upon the totality of the record", the Board, with one Member dissenting, reaffirmed its prior decision that the Union violated § 8(b)(4)(i) and (ii)(B) of the Act and reissued its remedial order (Pet. App. p. 31a). The Board relied upon the fact that "Simmons was without power to fulfill the desires of the Union unless Simmons forced Anderson and the Hospital to change their lifetime guarantee or caused the Hospital to cease doing business with Simmons and Anderson (Pet. App. pp. 29a-30a). The Union's expressed concern over Anderson's "substandard" wages, and its interest in supporting a general policy "not to install precut doors" rather than supporting specific claims made *sua sponte* by Simmons' jobsite carpenters also evidenced the Union's boycott was to secure objectives elsewhere (Pet. App. p. 30a). The Board further noted that the Union's coercive conduct was not in fact in furtherance of "work preservation" because plastic-faced doors had not traditionally been installed by Union members (Pet. App. p. 30a). Finally, the Board emphasized that "no contract clauses have ever been agreed to . . . guaranteeing that fitting work on

such doors is to be done by unit employees" (Pet. App. p. 31a).[8]

D. The Decision of the Court of Appeals

The Court of Appeals set aside the Board's order and remanded the case for dismissal of the unfair labor practice complaint. Since "the control factor again appears to have played a decisive role," the Court considered the Board's ruling to be contrary to *National Woodwork, supra,* and reversible as a matter of law in the aftermath of the Court's *en banc Enterprise*[9] opinion (Pet. App. p. 23a). The Court also reviewed the record evidence of secondary object and found it "unsubstantial" (Pet. App. p. 23a). The Court emphasized that, in its view, Simmons could have resolved the labor dispute by agreeing to the Union's demand for premium pay as a condition of jobsite installation of the premachined doors without any direct impact on employers other than Simmons (Pet. App. pp. 22a-23a).

REASONS FOR GRANTING THE WRIT

I. Introduction

This case presents an important and significant extension of the "work preservation" doctrine, and raises issues beyond those presently before the Court in *Enterprise.*[10] The decision below is contrary to rulings

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[8] The Board stated that this analysis was required by the law of the case and should not be construed as abandonment of the control standard (Pet. App. p. 31a).

[9] *Enterprise Ass'n of Steamfitters, Local 638* v. *NLRB*, 521 F.2d 885 (1975), *cert. granted,* — U.S. —, 96 S.Ct. 1101 (1976).

[10] *Id.*

of the Court, conflicts with decisions of other circuit courts of appeals, and, without any legislative support, places virtually every boycott of prefabricated building products beyond the reach of § 8(b)(4) of the Act, regardless of the presence or absence of a "work preservation" provision reserving jobsite tasks for bargaining unit employees.

II. The Decision Below Is Contrary to the "Work Preservation" Rulings of the Court

The landmark decisions of the Court authorize coercive boycott activity only where a collective bargaining agreement specifically reserves jobsite work for bargaining unit employees and where the signatory employer retains the prerogatives to assign the disputed work. In *National Woodwork*, the Court construed the boycott proscriptions of § 8(b)(4)(B) to be inapplicable to coercive jobsite pressures directed solely at one employer to persuade him to abide by his contractual promise to assign work to bargaining unit members, where that same employer could simply reassign the work to meet the union's demand and thereby end the labor dispute.[11] The *ratio decidendi* for this analysis was the specific work preservation agreement existing between Frouge, the struck employer, and his employees. The Court specifically held that "agreements directed to work preservation" were not prohibited by § 8(e) of the Act (386 U.S. at 640), and

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[11] This contractual provision provided in pertinent part:

> No member of this District Council will handle material coming from a mill where cutting out and fitting has been done for butts, locks, letter plates, or hardware of any description, nor any doors or transoms which have been fitted prior to being furnished on job, including base, chair, rail, picture moulding, which has been previously fitted.

noted that such agreements were common "within the collective bargaining framework." 386 U.S. at 643. The Court's test of a permissible boycott postulated the existence of an employer's contractual promise to make work assignments only to bargaining unit employees (386 U.S. at 645): "The touchstone is whether the *agreement* or its maintenance is addressed to the labor relations of the *contracting* employer *vis-a-vis* his own employees." (emphasis supplied)

Houston Insulation Contractors Ass'n v. *NLRB*, 386 U.S. 664 (1967), the Court's other "work preservation" decision, is likewise founded upon a specific agreement in the context of collective bargaining to reserve certain tasks for bargaining unit employees. There Armstrong agreed with Asbestos Workers Local 22 to a contractual provision precluding subcontracting of work at any jobsite relating to "the preparation, distribution, and application of pipe and boiler (insulation) coverings." [12] Here, it is undisputed that neither the local agreement between the Union and the Decatur Contractors Association, nor Simmons' contract with the International Union contains any limitations upon the type of materials which may be utilized in meeting Simmons' contractual obligation to the Hospital.

Necessarily outside the reach of these narrow precedents are employers who have not made such a contractual promise.

tractual promise. In such circumstances an employer's decision to order materials in the performance of busi-

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[12] The specifications on the construction project where the Union struck Armstrong did not require use of the prefabricated insulation material. See 148 NLRB 866 (1964).

ness obligations, like the decision to cease doing business,[13] is normally within its discretion to manage its business, subject only to limitations freely entered into, in the give and take of collective bargaining.[14] Where no such contractual limitations exist, an employer is "disinterested" in the union's boycott and thus protected by § 8(b)(4) from coercive union pressure to support boycott objectives against third parties. The decision below is contrary to the narrow exception to this protection assayed by the Court in *National Woodwork* and *Houston Insulation.*[15]

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[13] *Textile Wkrs.* v. *Darlington Mfg. Co.*, 380 U.S. 263, 274 (1965).

[14] *Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203 (1964) is not to the contrary. That opinion was carefully limited to the facts before the Court, *i.e.*, the elimination of *all* bargaining work. "Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy (footnote omitted)." 379 U.S. at 215. Unlike the facts in *Fibreboard* the job specifications here eliminated only a small portion of the Union's jobsite tasks. This partial "subcontracting" is not a mandatory subject of bargaining, and the Board's General Counsel so recognized by dismissing the Union's refusal to bargain charge filed against Simmons (Pet. App. pp. 72a-73a).

[15] The Court of Appeals acknowledged (Pet. App. p. 48a) that Simmons was under no contractual obligation to honor the Union's "work preservation" demands, but, in the face of contractual silence on this point, relied upon the "law of the industry and a particular shop" to conclude that the Union "had a contractual claim on Simmons" (Pet. App. p. 49a). In the absence of any bargaining history, silence on the matter in controversy is not to be construed as a contractual waiver of management's rights. *E.g.*, *Radiocar Corp.*, 199 NLRB 1161 (1972). See also *NLRB* v. *J. H. Allison & Co.*, 165 F.2d 766, 768 (6th Cir.), *cert. denied*, 335 U.S. 814, *reh'g denied*, 335 U.S. 905 (1948). Cf. *Teamsters' Union* v. *Lucas Flour Co.*, 369 U.S. 95, 106 (1962) (union's *implied* strike promise no broader than employer's express arbitration promise). The Board found that neither the Union nor the International Union attempted in negotiations to limit

(cont.)

III. The Decision Below Is Contrary to the Rulings of Other Circuits

A. The Union's Jobsite Work Stoppage

The Ninth Circuit has ruled that § 8(b)(4)(B) proscribes threats of jobsite strikes directed to non-signatory contractors to compel observance of "work preservation" objectives. *Western Monolithics Concrete Prods. Inc.* v. *NLRB*, 446 F.2d 522 (9th Cir. 1971). Even though the general contractor in that case could conceivably have satisfied the union's demands by ordering other than prefabricated fireplaces, the absence of a collective bargaining agreement with the pressuring union placed the general contractor beyond any obligation to assign work to union members or to pressure other contractors to reassign the disputed work to union members. The Fourth Circuit has also held that "work preservation" work stoppages are secondary if directed to any employers "not in (contractual) privity" with the striking union. *George Koch Sons, Inc.* v. *NLRB*, 490 F.2d 323, 327 (1973). *Accord: Carpenters, Local 112 (Summit Valley Inds. Inc.)*, 217 NLRB No. 129 (1975), 89 LRRM 1799 (review petitions pending 9th Cir.) (Nos. 75-2064, 2166, 2770).

The Court of Appeals made no effort to reconcile or distinguish these contrary authorities which squarely

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jobsite installation of premachined millwork (Pet. App. p. 31a). And as the Board found, the practice, if any, in the Union's jurisdiction had been to install premachined doors without protest (Pet. App. p. 27a n.7).

The Court of Appeals (Pet. App. (49a) also faults Simmons for not reaching some "compromise" with the Union at the time it entered into the contract with the Hospital. At that time, however, the Hospital had not yet exercised its unilateral option to require premachined doors (Pet. App. pp. 65a-66a).

hold that § 8(b)(4)(B) bars coercive conduct directed against contractors, like Simmons, who are not subject to work preservation agreements with the pressuring union. Review is thus appropriate to resolve an issue, not presented in *Enterprise,* now the subject of squarely contrary circuit court holdings.

To be sure labor organizations may be emotionally inclined to enlist as many contractors as possible to keep certain prefabricated products out of the union's jurisdiction. Unconsenting employers, however, are protected by § 8(b)(4) from coercive threats and strikes to force them to accede to such union objectives which preforce require termination of existing business relationships. This statutory provision reflects a specific Congressional policy to preclude unions from using unoffending and disinterested employers to enforce boycotts against products manufactured by third parties. *NLRB* v. *Local 769, Elec. Wkrs.,* 405 F.2d 159, 163 (9th Cir. 1968), *cert. denied,* 395 U.S. 921 (1969). And the circuit courts have consistently recognized that union-caused work stoppages to protect *future* work opportunities for union members or to advance the *general* welfare of union members are beyond the legitimate interests of bargaining unit employees and thus violate § 8(b)(4). *Local 216,* Teamsters v. *NLRB (Bigge Drayage Co.),* 520 F.2d 172, 179-80 (D.C. Cir. 1975); *NLRB* v. *New York Lithographers,* 385 F.2d 551, 555 n.10 (3d Cir. 1967); *Local 710, Meat and Highway Drivers* v. *NLRB,* 335 F.2d 709, 717 (D.C. Cir. 1964).

B. The Union's Demand for Wage Compensation

The Court of Appeals also held that the Union's demands for financial compensation from Simmons for

work performed by Anderson's plant employees would not constitute coercive conduct within the scope of § 8 (b)(4) of the Act (Pet. App. pp. 21a-22a). Congress, however, intended to foreclose all "threats [of] labor trouble or *other consequences*" and to prohibit the carrying out of such threats by a "strike or other economic retaliation." II Legislative History of LMRDA (GPO, 1959) at 1568(2), 1523(1), 1581(1).

The Ninth Circuit has reflected this legislative intent in decisions holding that assessments unilaterally imposed by labor organizations either by fines or wage compensations are prohibited by this provision of the Act. In *Acco Constr. Equip. Inc.* v *NLRB*,[16] the Operating Engineers fined certain contractors who assigned jobsite repair work on heavy equipment to non-members of that union The court ruled that "this unilateral fining mechanism constitutes a form of coercive economic pressure" within the scope of § 8(b)(4)(ii)(B). 511 F.2d at 852. And in *Associated General Contractors of Cal.* v. *NLRB*,[17] an assessment of $557.-76, the equivalent of wages and fringe benefits not earned by union members, charged a contractor who installed hospital scrub stations containing prefabricated piping was held violative of § 8(b)(4)(B). Such an assessment enlisted an unoffending employer in the union's boycott of prefabricated plumbing fixtures since "this [assessment] practice will influence the business decisions of hospital builders and scrub sink manufacturers." 514 F.2d at 434. See also *NLRB* v. *Local 769, Elec. Wkrs., supra* (threat to terminate existing contract to enforce union boycott "coercive" within the scope of § 8(b)(4)(B)). The decision below inverts

[16] 511 F.2d 848 (9th Cir. 1975).

[17] 514 F.2d 433 (9th Cir. 1975).

this reasoning by concluding that demands for compensation as a condition for cessation of "jobsite work stoppage" is outside the reach of § 8(b)(4), simply because Simmons refused to accede to this "compromise". But Simmons itself had no funds to make additional payments to the Union. And Simmons had no basis in its price contract with the Hospital to make a claim for compensation for additional labor costs. Thus, this "option," given great weight by the Court below (Pet. App. p. 22a), was actually illusory.

As the Court of Appeals noted (Pet. App. pp. 21a-22a n.19), the question of whether compensation demands for work not actually performed by jobsite employees violates § 8(b)(4)(ii)(B) is not presented in *Enterprise*. The Ninth Circuit has held in the cases discussed above and the realities of this case reflect that product boycotts can be as effectively maintained by compensation demands as by strikes and threats of work stoppages. See also Leslie, "Right to Control: A stuy in Secondary Boycotts and Labor Antitrust," 89 Harv. L. Rev. 904, 912 (1976). It is essential then that the Court accept this timely opportunity to resolve both questions presented here so that the scope of § 8(b)(4)(B) boycott protection can be delineated in one decision.

IV. The Decision Below Undermines National Labor Policy

The Court of Appeals' ruling authorizes labor organizations to use unwilling employers as pawns to enforce product boycotts. This ruling not only effectively nullifies the protection Congress extended to such unconsenting employers in § 8(b)(4)(B), but also restrikes the balance between labor and management created by

Congress in the 1947 Taft-Hartley Act. This statute was enacted to limit labor's free exercise of economic weapons and to protect employers from the harsh consequences of union boycotts. Senator Taft characterized this statutory philosophy on the Senate floor before passage of the Taft-Hartley Act (93 Cong. Rec. 7690-91 (1947)):

> We have tried to correct secondary boycotts and jurisdictional strikes. The truth is that originally, before the passage of any of the laws dealing with labor, the employer had all the advantage. He had the employees at his mercy, and he could practically in most cases dictate the terms which he wished to impose. Congress passed the Clayton Act, the Norris-LaGuardia Act, and the Wagner Act. The latter act was interpreted by a completely prejudiced board in such a way that it went far beyond the original intention of Congress, until we reached a point where the balance had shifted over to the other side, where the labor leaders had every advantage in collective bargaining and were relieved from any liability in breaking the contract after they had made the bargain. That was a condition under which strikes actually were encouraged and protected, no matter what the purpose or the character of the particular strike.

The Court has been faithful to this legislative intent to prevent unions from forcing employers to boycott "someone else".[18] As one noted commentator has stated: "There was little justification for many

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[18] *E.g., NLRB* v. *Local 79, Plasterers*, 404 U.S. 116, 130, n.25 (1971); *NLRB* v. *Local 825, Operating Engineers*, 400 U.S. 297, 302-03 (1971); *NLRB* v. *Radio and Television Broadcasting Engineers*, 364 U.S. 573, 580-81 (1961); *Local 501, Elec. Wrks.* v. *NLRB*, 341 U.S. 694, 705 (1951); *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 686 (1951).

secondary boycotts and jurisdictional strikes." Cox, "Some Aspects of the Labor Management Relations Act, 1947", 61 Harv. L. Rev. 274, 314 (1948).

To permit unions to strike employers who are under no contractual obligation to the union, grants labor organizations broad economic leverage beyond current representational and contractual interests. Such pressure directly disrupts seemingly unrelated transactions which evolve out of increasingly close economic interrelationships. These residual impacts tip the balance of economic power in favor of unions by closing markets to employers thereby limiting their growth possibilities, in contravention of express national labor policy set forth in § 8(b)(4).

Commentators have also noted the adverse impact "work preservation" claims have upon the nation's most significant industries, and upon technological innovations in production methods. See generally Brinker and Taylor, "The Secondary Boycott Maze," 25 Lab. L. J. 418, 427 (1974); Petro, "Unions, Housing Costs, and the National Labor Policy," 32 Law & Contemp. Prob. 319, 322 *et seq* (1968). Economists have also concluded that the work preservation concept is not based upon valid economic theory and does not actually have the effect of preserving jobs for union members.[19] The knowledge now available may

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[19] Meyers and DePodwin, "The Economic Personality of the Construction Industry and the Need for Technological Change" (New York 1973); and Meyers and DePodwin, "A Theoretical Analysis of the Work Preservation Concept" (New York 1973).

The necessity for a coordinated interrelationship between national labor and economic policies has also been persuasively set forth in Wellington, *Labor and the Legal Process*, 298-333 (New Haven 1968). *Cf. Southern S.S. Co.* v. *NLRB*, 316 U.S. 31, 47 (1942) (Labor Board must take account of other important congressional polices in administering federal labor policy).

provide a basis for reconsideration of the "work preservation" doctrine in light of both national labor and antitrust policy. Cf. *Connell Constr. Co.* v. *Local 100, Plumbers,* 421 U.S. 616 (1975). As the Court stated in *Allen Bradley Co.* v. *Local 3, Elec. Wkrs.,* 325 U.S. 797, 811 (1945):

> We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the [Sherman] Act.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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